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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

NO. 381

MURIEL F. McCARTY,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

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RAY FRANKLIN BUSHAW,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

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MARVEL SANSBURY, by MURIEL F. McCARTY, Guardian Ad Litem,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

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## SUPPLEMENTAL BRIEF FOR PETITION FOR WRIT OF CERTIORARI

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

The denial by the Supreme Court of Minnesota of petitioners' petition for reargument of their cases on May 17, 1951, constitutes a denial of petitioners' rights guaranteed them under the Fourteenth Amendment of the Constitution of the United States.

The opinion of the Supreme Court of the State of Minnesota, after preliminary statements about parties and pleadings, holds in effect that by submitting an issue for a special verdict of the jury, destroyed the equitable status of plaintiffs' cases. Petitioners each brought their actions for specific performance to enforce an oral contract to secure a child's interest in the estate of their father and the trial court suggested that the question of whether or not this oral agreement was made could be submitted to the jury for special verdict. All agreed to call a jury to determine this one issue. The aforesaid ruling of the Supreme Court of Minnesota constitutes a denial of petitioners' rights guaranteed them under the Fourteenth Amendment of the Federal Constitution. The ruling so made constitutes a mixture of law, fact and equity and created confusion to be unraveled by this Court.

Then, by the language of the remaining decision of the Supreme Court of the State of Minnesota, there arises the question whether petitioners in their actions for specific performance of their agreements with the decedent, Albie C. Sansbury, in submitting to the jury for its special verdict the question of whether the said contract involved had been made, necessitated the consideration by the jury of all the evidence in the case going to the proof of performances of various and varied duties and the maintenance of father and child relationship on the part of petitioners in performance of said contract, and not only the consideration by the jury of the

substance of the language testified to that was used at the time the agreement in question was made, in order to enable the jury to render a special verdict on the question whether said contract was made or was not made.

The Supreme Court of Minnesota in its consideration of the decision in the trial court sets out in its opinion the form of the special verdict question as well as Finding of Fact XXII as being the pivotal finding of fact of the twenty-three findings of fact and Memorandum of the trial court made a part of the decision. Thereafter the Supreme Court of Minnesota set out the following:

> "On appeal, defendants contend that the trial court's Finding No. XXII, above quoted, and its other related findings, its conclusions of law therefrom and order for judgment for plaintiffs are not justified by the evidence and are contrary to law. At the oral argument, defendants' counsel conceded that the evidence was sufficient to support the special verdict of the jury in each case, i.e., that Albie C. Sansbury agreed to consider and treat plaintiffs as his own children, but maintained that the trial court's findings are not justified by the evidence and that the special verdict of the jury does not support the lower court's decision."

The substance of appellants' argument in support of their appeal is contained in their brief, pages 10 to 11, which is in the following language:

> "The record here is devoid of any basis which would justify the finding of a contract in any of the cases on appeal here. The only evidence supplied by plaintiffs which would tend in any way to support their claim of contract is found in testimony of Mrs. Leah Rempher and Otto Frenzel. She testified that right after the Sansburys were married, and while they were living in the Garfield Hotel, Minneapolis, she heard Mr. Sansbury say, 'If you kids do your part, why, I will do my best as a father to you children' (p. 107, ff. 1, 2 and 3; p. 108, ff. 1 and 2). She further testified, 'He said he was taking these children and going to do the best by them that he

could' (p. 109, ff. 1, 2 and 3). Her strongest testimony was that he said, 'I have agreed to take these three children as my own children and treat them as a natural parent would' (p. 185, f. 1).

"Otto Frenzel related a sole conversation he had with the deceased in which he claimed he was told that Sansbury 'would take care of the children just like his own' and that he 'was going to provide for each of them when he passed away' (p. 178, f. 2; p. 179, f. 1). There was no mention of a will (p. 182, f. 3).

"It is significant that the only direct promise made by Sansbury to his stepchildren, the plaintiffs, was that 'I will do my best as a father to you children.' All other evidence, such as it is, consists of his statements to Mrs. Rempher and Otto Frenzel, and that is taking the testimony on behalf of plaintiffs in its most favorable light and as being true. Even thus taken, the evidence does not constitute 'clear, positive and convincing proof' of an express, affirmative and positive contract. It cannot even justify a remote inference of a contract. There was no offer or acceptance. There was no promise or agreement. There was no contract.

"Assuming that the evidence justifies the special jury verdict which was adopted by the Court, it adds absolutely nothing to the solution of the issue. The jury's finding in each case, if it means anything, simply establishes that Albie Sansbury intended to treat his stepchildren as if they were his own natural children. That is certainly a far cry from a promise to leave them his property. A natural child has no more assurance of a vested inheritance than a stranger. He may be cut out without a cent. He is not the born or created promisee of property. And, if true, the expressed intention of Albie Sansbury to treat these plaintiffs as his own children was only a normal development following his marriage to their mother, and the understandable desire of a stepfather to get along harmoniously in the atmosphere which marriages of this kind usually generate."

The special verdict of the jury in favor of petitioners stands unchallenged and is a decisive question in petitioners' cases.

The judgments of the trial court were reversed on account of insufficiency of evidence in support of them. The prevailing rule exists that upon such an appeal if the Appellate Court finds in the record a decisive question decided in favor of respondent, the appeal will be dismissed and the judgment below affirmed. In the instant case, we have a jury that decided the decisive question in favor of petitioners. A recent case decided March 30, 1951, namely *State ex rel. Northern Pump Co., Relator, vs. So-called Village of Fridley, et al,* 47 N. W. (2d) 204; to the same effect are *Fred Blume vs. Gust Ballis, et al,* 207 Minn. 393, 291 N. W. 906; *Bakke vs. Bakke,* 175 Minn. 193, 220 N. W. 601; *Spies vs. Brandt,* 230 Minn. 246, 41 N. W. 561; *Locksted vs. Locksted,* 208 Minn. 551, 299 N. W. 266.

The decision of the Supreme Court of Minnesota, in view of the aforesaid decision, deprives petitioners of equal protection of the laws clause of the Fourteenth Amendment of the Federal Constitution.

The following decisions cited in the opinion of the Supreme Court of Minnesota augers for petitioners by the utterances therein found and quoted below:

In *Brasch vs. Reeves,* 124 Minn. 114, 144 N. W. 744, involving interpretation of a contract for specific performance, the Court said at page 146:

> "The law applicable to cases of this kind is well settled. There must be full and satisfactory proof of the fact of a contract and of its terms before there can be specific performance. If the contract is sufficiently proved and is definite in terms and has been performed by the plaintiff, and a peculiar and domestic relation has been assumed pursuant to which services incapable of pecuniary valuation have been rendered, specific performance will be decreed. The evidence is always to be examined attentively and weighed carefully. The object is to find the truth. The large burden of responsibility is on the trial court. (Citations omitted.)"

In *Hanfield v. Fairbrother,* 191 Minn. 547, 254 N. W. 821, the essence of the decision is contained in the following statement of the Court:

> "The oral agreement upon which plaintiff claims, made just before marriage of her father to Miss Fairbrother was in contemplation of marriage, was for an interest in real estate and so not enforceable because not in writing in complying with the statute of frauds. 2 Mason Minn. Statute (1927), Secs. 8456 to 8460. The findings are that plaintiff gave no consideration for that contract. That would be unnecessary if consideration were otherwise present. Plaintiff has not established that she made partial performance by way of services or otherwise to entitle her now to a decree of specific performance * * *."

In *Greenfield vs. Peterson,* 141 Minn. 475, 170 N. W. 496, the Court said therein, at pages 478-479:

> "It seems unlikely that plaintiff, burdened with the multifarious duties of her own home, could have had much time to devote to the Gummensons, or much occasion to assist them. But taking plaintiff's own statement of the amount and character of the services rendered, they are not sufficient to justify a court in enforcing specific performance of the alleged contract. She always resided in her own home with her husband and children and devoted herself to the duties of her own household. She never became an inmate of the Gummenson's home and never assumed that peculiar and domestic relation to the Gummensons as a member of their family and household, which is an essential element of such a part performance as will save the contract from being barred by the statute. (Citations omitted.)"

In *Edmund T. Carlson vs. Harry W. Carlson, et al,* 211 Minn. 297, 300 N. W. 900, at page 297, the Court says:

> "In a suit to compel specific performance of an oral contract to make a will, the Court found that plaintiff had failed to prove the agreement alleged in * * * his complaint or any other enforceable agreement by the kind and character of evidence which is required by law and

hence that there was no such agreement made. Judgment of dismissal was directed and later entered and plaintiff appeals."

The Court concludes its decision by saying in the last paragraph thereof:

"Measuring the evidence as disclosed by the record by the foregoing yardstick, we think there can be no doubt that at most plaintiff's case furnished a fact issue for the trial court. It has assumed and discharged the large burden of responsibility (Brasch vs. Reeves, supra), resting upon it, and upon this record, it is not for us to interfere."

*Kinæ vs. Knozky*, 135 Minn. 327, 160 N. W. 868, also cited in the opinion on the facts disclosed therein it is submitted it is also inapplicable to petitioners' cases.

Petitioners were denied the rights guaranteed them under the Fourteenth Amendment of the Federal Constitution in applying the aforesaid decision in the defeat of their rights.

The Supreme Court of Minnesota wholly ignored the Memorandum of Findings and Conclusions of the trial court as well as Finding of Fact XXV, involving the parenthood of defendant Margueriette H. DeKarlo and her adoption and her status in this case. The record disclosed that Albie C. Sansbury was the father of this defendanf, but through the magnanimous fortitude of Alice Ames Sansbury, his wife, and her foregoing such act and forgiving her errant husband of his unfaithfulness to her in his marriage vows, consented to the taking in of said defendant into the home, and after six years, adopting her, making four children instead of three children in the Sansbury family. The trial court, sitting as an equity court to administer justly, adjudged and decreed that the estate of Albie C. Sansbury should be divided equally among the four children (R. p. 46, 51, 52, 202-9).

The testimony of the witness, Leah Rempher, disclosed her conversation with Alice Ames Hierlmeier before she married Albie C. Sansbury; that she would marry no man unless he agreed to take her three children as his own children and become a natural father to them. Petitioners cite the Court to this question as presented in their petition for reargument, and found in the record (R. pp. 328-330). Indicative of decision being violative of the Fourteenth Amendment of the Federal Constitution.

The question of the sufficiency of the evidence to establish said agreement was presented in petitioners' petition for reargument and refers this Court thereto (R. pp. 295-302). Indicative of decision being violative of the Fourteenth Amendment of the Federal Constitution.

The question presented when there is a conflict in the evidence was also a matter involved in petitioners' petition for reargument and this Court is referred in respect thereto (R. pp. 314 to 322). Indicative of decision being violative of the Fourteenth Amendment of the Federal Constitution.

The Supreme Court of Minnesota cited in the margin of its opinion the following cases: *In re Estate of Firle,* 197 Minn. 1, 265 N. W. 818; *Fiske vs. Lawton,* 124 Minn. 85, 144 N. W. 455. See *Odenbriet vs. Utheim,* 131 Minn. 56, 154 N. W. 741. These cases auger in support of petitioners' cases.

*Fiske vs. Lawton,* supra, cites *Lynn, et al, vs. Hockaday,* 162 Mo. 111, 61 S. W. 885, in support, which case involves the right of a person taken into a family without any written agreement and at the time of the trial in question only one witness remained to tell of the arrangement of this person becoming a member of the family which she did haltingly. The lower court held the evidence insufficient and on appeal there was a reversal, as well as a long opinion covering a situation of that character. Petitioners' witness, Leah Rem-

pher, had to testify to what occurred more than forty years ago, after the agreement of her sister, Alice Ames Hierlmeier, when she married Albie C. Sansbury. Other witnesses had passed beyond and those who were living were disqualified by interest in the cases. This case is cited in support of the opinion in *Dillman, et al, vs. Davison*, 239 S. W. 505, which involved another case of a youth being taken into the family without any written agreement as to his status therein, and to establish that status he had to depend on a verbal agreement made by his father before him in his behalf, the Court saying:

> "* * * But we think such agreement was clearly evidentiary of a previous parol agreement between William R. Moore and the father of the defendant on behalf of the defendant to adopt defendant and to make him an heir. From all the circumstances in the case the defendant was aware of this agreement. There is abundant evidence of performance on his part and that such performance was referable to the terms of such agreement, as well as to the apprenticeship agreement. * * *"

The conversation that took place around the table just after Albie C. Sansbury had married Alice Ames Hierlmeier and the utterances that Albie C. Sansbury made, is indicative of his having made the agreement with Mrs. Sansbury prior to her marriage to him; and that as a consideration for marriage to him he was obliged to agree to take her children as his own children and become a natural father to them. *Odenbreidt vs. Utheim,* supra, was a case where the claimant therein was a member of the family without written agreement as a child of the family and would have taken a child's share but was disinherited by a will, like any parent may do with his own blood child. Albie C. Sansbury, however, died intestate.

The Supreme Court of Minnesota in the last three paragraphs of its opinion confirms what it held in the first part

of its opinion, that petitioners' cases when they called a jury to decide an issue, the case lost its equitable status. The tenor of the expressions found in these paragraphs almost likens the writer of the opinion to a juror arguing with his fellow members of the jury to have the case decided according to his opinion of the facts. The evidence adduced by the parties, together with the reasonable inferences fairly and reasonably arising therefrom, tends to show that decedent, Albie C. Sansbury, made the oral contract in question and in accordance therewith petitioners and decedent lived as natural child and natural parent and the agreement was faithfully and fully performed on both sides, except that Albie C. Sansbury died unexpectedly without carrying to conclusion by distributing his estate before his death and by failure to make a will and leaving it to the law for distribution under which each child would share equally. A number of disinterested witnesses gave testimony of a working cooperation of petitioners with their father and of filial relationship exhibited and existing among them, as well as the testimony of the grandchildren of Albie C. Sansbury indicating a relationship of parent and child and grandparent and grandchild. There was substantial evidence that the lives of the parties, petitioners and decedent, demonstrated a mutual carrying out and fulfillment of the original agreement that made them father and child. The evidence in the case should be viewed in the light most favorable to the petitioners giving the petitioners the benefit of every inference favorable to them that may be reasonably drawn from the evidence. It is the province of the trier of facts to resolve all conflicts in the evidence and to pass upon the creditability of the witnesses and the weight to be given to their testimony; and if on any determinative issue in the case, reasonable and fair-minded men draw different inferences or conclusions to the evidence, such issue is one exclusively for the trier of facts.

The opinion of the Supreme Court of Minnesota indicates that it apparently followed the pattern of the written argument made to overthrow the judgments of the trial court by counsel for appellants on appeal therein and respondents herein and set out above.

We mean no disrespect to the honorable Judges of the Supreme Court of Minnesota who promulgated the opinion of that Court on review herein when we say that therein the Court rendered lip service to the rule that upon respondents' appeal in the State of Minnesota Supreme Court as appellants, the evidence must be taken most strongly against them and viewed in the light most favorable to the respondents there, and the petitioners herein; but utterly failed to apply the rule to the facts of the record before the Court; utterly failed to realize and make a proper application of the equitable principles governing actions in equity to the evidence adduced. The special verdict of the jury determined that the oral contract in question was made, which remains unchallenged by counsel or court, and upon which the findings of fact of the trial judge was based. There is such a mixture of law, fact and equity in this opinion warranting a review by this Court.

Respectfully submitted,

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